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NO. 80-1960

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID WILLSON, APPELLANT,

v.

STATE PERSONNEL BOARD, DEPARTMENT OF GENERAL SERVICES, STATE OF CALIFORNIA, APPELLEES.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

# JURISDICTIONAL STATEMENT

PHILIP E. CALLIS
California State Employees' Association
160 Franklin Street, Suite 302
Oakland, California 94607
Telephone: (415) 835-1900

Counsel for Appellant

## QUESTIONS PRESENTED

1. Whether a state agency's enforcement of California Government Code section 19503(a), whereby a permanent state civil service employee who is absent without leave for five consecutive working days is deemed to have automatically resigned from state service, constitutes a deprivation or taking of property under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether California Government Code section 19503(a) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by providing for the summary termination of a permanent state civil service employee after five days' absence without leave without

providing any form of procedural protection until a post-termination hearing is conducted before the California State Personnel Board.

3. Whether California Government Code section 19503(a) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily mandating the automatic resignation of a permanent state civil service employee after five days' absence without leave even when the employer knows that the employee has no intention of resigning.

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DAVID WILLSON, APPELLANT,

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ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

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# JURISDICTIONAL STATEMENT

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DAVID WILLSON, the appellant, appeals from the final judgment of the California Court of Appeal, Third Appellate District, dated December 15, 1980, which holds that the "automatic resignation" provision of the California State Civil Service Act (California Government Code section 19503(a) does not violate due process.

## OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District, which appears in the appendix hereto, p. 1a, infra, is reported at 113 Cal.App.3d 312, 169 Cal.Rptr. 823 (1980).

The findings of fact and decision of the California State Personnel Board, dated June 8, 1978, are not reported. They are reprinted in the appendix hereto, p. 18a, infra.

The decision of the Sacramento County Superior Court, dated October 17, 1979, is not reported. It is reprinted in the appendix hereto, p. 16a, infra.

## JURISDICTION

The judgment of the California Court of Appeal, Third Appellate District, was entered December 15, 1980. This judgment affirmed the decision of the Sacramento County Superior Court denying appellant's petition to set aside the California State Personnel Board's decision which had denied appellant reinstatement after automatic resignation. See p. 1a, infra. Appellant's timely petition for hearing to the Supreme Court of California was entertained and denied on February 18, 1981. See p. 26a, infra.

A notice of appeal to this Court was duly filed in the California Court of Appeal, Third Appellate District, on May 5, 1981. See p. 27a, infra. Since this appeal was filed and is being docketed within 90 days from the denial of hearing

by the Supreme Court of California, the appeal is timely. See 28 U.S.C. section 2101(c); Rules 11 and 12 of the Rules of the Supreme Court of the United States; Banks v. California (1969) 395 U.S. 708 American Railway Express Co. v. Levee (1923) 263 U.S. 19.

The jurisdiction of this court is invoked under 28 U.S.C. section 1257(2).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Fourteenth Amendment, United States Constitution:

"...nor shall any State deprive any person of life, liberty, or property, without due process of law."

California Government Code section 19503(a):

"Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked.

"A permanent or probationary employee may within 90 days of the effective date of such separation, file a written request with the board for reinstatement; provided, that if the appointing power has notified the employee of his automatic resignation, any request for reinstatement must be made in writing and filed within 15 days of the service of notice of separation. Service of notice shall be made as provided in Section 18575 and is complete on mailing. Reinstatement may be granted only if the employee makes a satisfactory explanation to the board as to the cause of his absence and his failure to obtain leave therefor, and the board finds that he is ready, able, and willing to resume the discharge of the duties of his position or, if not, that he has obtained the consent of his appointing power to a leave of absence to commence upon reinstatement.

"An employee so reinstated shall not be paid salary for the period of his absence or separation or for any portion thereof."

California Administrative Code, Title 2, section 67:

"When there is filed with the board...any appeal...from an automatic... resignation, ... such filing shall automatically operate as the reference of every such proceeding to the hearing officer for hearing or investigation without hearing as appropriate; but no such reference shall preclude the board from recalling the proceeding for hearing or investigation by it. . . . In any case, when a proceeding has been assigned to the hearing officer, the hearing officer is the authorized representative of the board and is fully authorized and empowered to grant or refuse extensions of time, to set such proceeding for hearing, to conduct a hearing or investigation in every such proceeding, and to perform any and all other acts in connection with such proceeding that may be authorized by law or these rules."

## RAISING THE FEDERAL QUESTIONS

The question of whether California Government Code section 19503(a) violates procedural due process was originally raised at the administrative hearing by appellant's union representative who objected that appellant had not been "notified of his rights of procedure as to the Skelly decision[1/] which in

1/ In Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 Pac.2d 774, the California Supreme Court held that the punitive action provisions of the State Civil Service Act (California Government Code sections 19574 -19588) violated procedural due process by failing to provide certain preremoval safeguards before dismissal of a permanent civil service employee. The California State Personnel Board subsequently adopted a rule requiring five days written notice of the proposed punitive action, and an opportunity to respond to the charges, prior to the effective date of the action (California Administrative Code, Tit. 2, section 61).

effect gives him five days to go before his appointing power and explain the reasons for his absence." See partial transcript of the administrative hearing, p. 29a, infra. This objection was overruled by the hearing officer on the grounds that such rights applied only to punitive actions and not to automatic resignations. See p. 33a, infra.

Appellant renewed this claim before the Sacramento County Superior Court, but the court ruled that "...in the situation at bar, where the absence was voluntary and not involuntary, no constitutional attack can be leveled at Government Code Section 19503." See p. 17a, infra.

Appellant again renewed his procedural due process claim before the California Court of Appeal, but the court rejected the claim on the grounds that (1) there had been no deprivation or taking of

property for due process purposes, and (2) even if there had, due process would not require any preremoval safeguards in the case of an automatic resignation. See p. 1a, infra. The claim was included in appellant's petition for hearing to the California Supreme Court which was denied without opinion. See p. 26a, infra.

With respect to appellant's substantive due process claim, appellant did not originally state the claim in constitutional terms, but instead attacked the harshness of the statute as applied to him. See p. 31a, infra.

The California Court of Appeal considered this attack to be more appropriately made as a substantive due process argument, and sua sponte considered and rejected the claim on that basis, observing "that the Legislature reasonably could have concluded that voluntary

absence without leave for five consecutive working days justifies a finding of constructive resignation." See p. 14a, infra. Appellant included the substantive due process claim in his petition for hearing which was denied without opinion by the California Supreme Court. See p. 26a, infra.

Both due process claims have thus been presented to, and explicitly passed upon, by the highest state court in which a decision could be had. The questions are thus properly before this Court on appeal. 28 U.S.C. section 1257(2).

## STATEMENT OF THE CASE

Appellant David Willson was summarily terminated from his permanent state civil service position as a building maintenance worker with the Department of General Services in Sacramento, California, after he falsely told his superiors that he was

home ill for a period of seven working days when in fact he was in another city retrieving $7,000 to $10,000 worth of scrap lumber for his own private use.

Instead of proceeding against Willson for dishonesty and misuse of sick leave under the punitive action provisions of the State Civil Service Act (Cal. Gov. Code sec. 19570-19588), the state retroactively denied Willson's request for sick leave, refused Willson's subsequent request to charge the absence to vacation or leave without pay, and then deemed the seven day absence an "automatic resignation" under the provisions of California Government Code section 19503(a).[1/]

1/ Section 19503(a) provides in pertinent part: "Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked."

The state separated Willson under this section even though Willson had never evidenced any intention of resigning or otherwise permanently abandoning his position.

By treating Willson's misconduct as grounds for "automatic resignation" rather than as grounds for punitive action, the state was able to separate Willson from his employment without providing him with any of the "preremoval safeguards" required by State Personnel Board rule[2/], or with any of the other

2/ State Personnel Board Rule 61 provides: "At least five calendar days prior to the effective date of any punitive action against an employee with permanent civil service status, the appointing power or any person authorized by it shall give the employee written notice of the proposed action, the reasons for such action, a copy of the charges and material upon which the action is based, and the right to respond either verbally or in writing, to the authority proposing the action prior to its effective date." (Cal. Admin. Code, tit. 2, sec. 61.)

procedural rights associated with punitive actions, such as notice of charges and as hearing where the state must prove the charges and justify the degree of punishment taken (see Cal. Gov. Code sec. 19570- 19588). Instead, Willson was retroactively separated as of the first day of his absence from work by service of a simple written notice notifying him of the agency's action[3/], and was afforded only a post-termination hearing at which he bore the burden of establishing "a satisfactory explanation to the board as to the cause of his absence and his failure to obtain leave therefor." (Cal. Gov. Code sec. 19503(a).) Even if Willson was otherwise

3/ It should be noted that while Willson was served with a written notice, section 19503 would appear to allow a separation without any notice whatsoever to the employee.

successful in obtaining reinstatement, section 19503 specifically denies the reinstated employee back salary "for the period of his absence or separation or for any portion thereof." (Ibid.)

At the subsequent State Personnel Board hearing which took place some six weeks after Willson's termination, Willson admitted that he had been absent from work for seven working days and that he had falsely called in sick on those days. The evidence showed that Willson's superiors had become suspicious of Willson's "illness" when they heard from other employees that Willson was working out of town. They had their suspicions confirmed when they called Willson's home and a young girl advised them that Willson was indeed out of town. Willson subsequently called in and confessed the true reason of his

absence and asked that the absence be converted to vacation or leave without pay.

Willson had vacation time on the books, and his supervisor testified that he would have granted Willson time off if he had requested it in advance. Willson had not requested advance approval because he was afraid he would be turned down because of comments he had made to the supervisor of building trades at the Christmas party. When Willson returned to work the following Monday and again asked his supervisors to allow him to convert the absence to vacation or leave without pay, the building manager refused this request with the statement: "If this was the first time and nobody else knew about it, we could handle it differently." The

building manager then served the notice of termination on Willson.

After making appropriate findings in accordance with the evidence, the hearing officer filed a proposed decision which concluded that since Willson had not made "a satisfactory explanation of the reason for his failure to obtain leave to cover the full period of his absence", he was not entitled to reinstatement under section 19503 (see p. 24a, infra). The State Personnel Board adopted this decision without modification. Willson then filed the instant mandamus action in the Sacramento County Superior Court seeking to set aside the decision of the Board.

In its published opinion affirming the trial court's judgment denying the writ, the California Court of Appeal, Third Appellate District, concluded:

(1) that due process did not apply to automatic resignations since there was no governmental action which amounted to a deprivation or taking of property; (2) that even if due process did apply, no preremoval safeguards were required in cases involving automatic resignation; and (3) that section 19503 was not arbitrary or overly harsh either by its terms or in its application (see p. 1a, infra). Appellant's petition for hearing to the California Supreme Court was denied without opinion. (See p. 26a, infra.)

## THE QUESTIONS ARE SUBSTANTIAL

### 1. The State's enforcement of the automatic resignation statute constitutes a deprivation or taking of property for due process purposes.

The first question presented by this appeal is really preliminary to the second two questions: does the state's enforcement of the automatic resignation statute

(California Government Code section 19503(a)) constitute a deprivation or taking of property for due process purposes? The California Court of Appeal answered this question in the negative, holding that since it was Willson's own act, and not the state's, which severed the employment relationship, there was no governmental action which amounted to a deprivation or taking for due process purposes. See p. 6a, infra. This Court must reject this conclusion for several reasons.

Initially, it must be observed that Willson's interest in his continued state employment was a property interest protected by due process. The California Supreme Court has conclusively determined that permanent state civil service employees, such as Willson, have a property interest in their employment

which warrants protection under both the federal and state constitutions. Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 Pac.2d 774; see also, Arnett v. Kennedy (1974) 416 U.S. 134. The sufficiency of a claim of entitlement under the Due Process Clause must of course be decided by reference to state law. Bishop v. Wood (1976) 426 U.S. 341, 344; Board of Regents v. Roth (1972) 408 U.S. 564, 577. Having determined that a protected property interest exists, the question then narrows to whether there has been sufficient governmental action to constitute a deprivation or taking of this interest for due process purposes.

In the instant case, Willson's "self-abdication" of his job occurred only after two significant actions were taken by the state. First, the state denied Willson's request for sick leave and his subsequent

request to convert his absence to vacation or leave without pay. It was only after these actions were taken that Willson's absence became an absence without leave which subjected him to section 19503's terms. Second, Willson's superiors refused to allow him to return to work on the Monday following his absence despite their discretionary authority to do so,[4/] and their apparent understanding that they "could handle it differently" if they so chose. This was not a case where the governmental action was too remote to the injury to constitute a

4/ California Government Code section 19140 provides in pertinent part: "In addition to reinstatement required under any other section, an appointing power may in his discretion, reinstate any person having probationary or permanent status who was separated from his position ... (d) under the provisions of Section 19503..."

governmental taking. Martinez v. California (1980) 444 U.S. 277. Nor was it a case where a govermental action only indirectly affected a group of benefit recipients. O'Bannon v. Town Court Nursing Center (1980) 477 U.S. 773. This was a case where the government's enforcement of a statute directly deprived one of its citizens of a protected property interest in a direct and foreseeable way. See O'Bannon, supra, 447 U.S. at 788.

If the Court of Appeal's logic is to be accepted, then the inevitable conclusion must be that this Court has been unnecessarily deciding due process cases in recent years. Dixon v. Love, (1977) 431 U.S. 105, Mackey v. Montrym (1979) 443 U.S. 1, and Barry v. Barchi (1979), all could have been disposed of by simply observing that it was the individual's own act, and not the state's, which caused the

"automatic" suspension of the individual's license. Yet, in none of these cases did this Court hold that due process did not apply.

Moreover, the Court of Appeal's logic breaks down completely if it turns out that the state was mistaken in its determination that the employee was not entitled to leave for the period of the absence. In such cases, the employee may very well be absent for the requisite period to trigger the "automatic resignation." Yet it may turn out later that the employee was entitled to leave and should not have been separated. See, e.g., Wallace v. State Personnel Board (1959) 168 Cal.App.2d 543, 336 P.2d 223, in which an employee was wrongfully denied sick leave and then improperly terminated under section 19503. In such a case, the employee has obviously suffered a wrongful

governmental taking of a significant property interest, yet under the Court of Appeal's logic due process would not apply since the wrongfulness of the denial of leave could not be determined until the subsequent hearing.

The end result of the California Court of Appeal's logic really involves a return to the discredited notion that the state may impose any procedural conditions it wants on the benefits it creates. Under this theory, Willson "must take the bitter with the sweet", and since it is his conduct which brought him under the provisions of section 19503, he must accept the procedural mechanisms of the statute. This theory was unequivocably rejected by a majority of this Court in Arnett v. Kennedy, supra, 416 U.S. 134, and in subsequent decisions, and should

not be allowed to return in this disguised fashion.

2. The automatic resignation statute violates procedural due process by failing to provide any form of pretermination procedural safeguards.

The principal question presented by this appeal is whether procedural due process is offended by a statute which allows for the summary termination of a permanent state civil service employee after five days' absence without leave without any form of pretermination safeguards.

In Mathews v. Eldridge (1976) 424 U.S. 319, this Court formulated the following test for procedural due process questions:

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of

> an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See e.g., Goldberg v. Kelly, supra, at 263-271." (424 U.S. at pp. 334-335.)

After weighing these factors, the Court concluded that an administrative procedure which provided an objective medical review of a disabled social security recipient's condition prior to termination of benefits was sufficient to meet the requirements of due process. (424 U.S. at 347-349.)

Since Mathews v. Eldridge, supra, this Court has upheld other administrative procedures which do not require a hearing prior to suspension of a governmental entitlement, so long as there is some objective basis for the initial taking action and an opportunity for a

post-suspension evidentiary hearing. In Dixon v. Love (1977) 431 U.S. 105, this Court upheld the summary revocation of a driver's license after conviction of three traffic offenses within a 12 month period on the basis that the driver "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based." (431 U.S. at 113.) In Mackey v. Montrym (1979) 443 U.S. 1, this Court upheld another summary revocation based solely on a sworn peace officer's affidavit that the driver had refused to take a sobriety test. 443 U.S. at 13-15. Similarly, in Barry v. Barchi (1979) 443 U.S. 55, summary suspension of a racehorse trainer's license was upheld on the sole basis of an expert's affirmance that the trainer's horse had been drugged.

However, in each of the above cases, even though a prior evidentiary hearing was not required, this Court has required "that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be." Mackey v. Montrym, supra, 443 U.S. at 13. Moreover, if the governmental interest in summary termination is not sufficiently compelling, this Court will require additional pretermination procedures. Vitek v. Jones (1980) 445 U.S. 480; Memphis Light, Gas and Water Div. v. Craft (1978) 436 U.S. 1.

The question posed by the instant case is whether a state statute which imposes no pretermination procedures of any kind, and does not rely on any sort of objective, independent basis for the administrative action, can nonetheless meet the requirements of due process. It is appellant's position that a proper analysis of the automatic resignation statute under the Mathews v. Eldridge, criteria, leads inescapably to the conclusion that it does not.

First, the private interest involved is substantial. Permanent state civil service employment, such as Willson's, has been previously determined by the California Supreme Court to be substantial enough to warrant the preremoval safeguards of prior notice and an opportunity to respond in cases of disciplinary action. Skelly v. State Personnel Board,

supra, 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 Pac.2d 774. This Court has recognized the importance of similar interests in cases involving nonprobationary federal civil service employees and tenured college teachers. Arnett v. Kennedy, supra, 416 U.S. 134; Perry v. Sinderman (1972) 408 U.S. 593.

With regard to the adequacy of the existing procedural protections available, it is clear that the procedures for an automatic resignation are vastly inadequate. A termination under section 19503 can be accomplished by a simple written notice, oral notice, or no notice at all. If the basis of the "resignation" is misconduct associated with leave time, there is no requirement of written notice of the charges or disclosure of the basis for the denial of leave.

While the State Personnel Board has provided by rule for a post-termination hearing or investigation (Cal. Adm. Code, tit. 2, sec. 67), the only time requirement for such a hearing is that it be held within a reasonable time and be concluded within six months of the filing of the appeal (Cal. Gov. Code sec. 18671.1). Compare Barry v. Barchi, supra, 443 U.S. at 66 (due process requires prompt post-deprivation hearing). Unlike a punitive action hearing for inexcusable absence without leave (Cal. Gov. Code sec. 19572(j)) where the burden of proof would be on the state, the burden of proof under the automatic resignation statute is on the employee to justify his absence and his failure to obtain leave.

Moreover, if the employee cannot "satisfactorily" explain his absence or his failure to obtain leave, then he is

not entitled to reinstatement even though similar misconduct would not warrant dismissal if punished under the punitive action provisions of the State Civil Service Act. Finally, even if the employee is successful on his appeal, section 19503 specifically denies back salary "for the period of his absence or separation or for any portion thereof." (Compare Gov. Code sec. 19584.)

It is thus apparent that the existing procedures under section 19503 are vastly inferior to the punitive action procedures struck down by the California Supreme Court in Skelly, and to those upheld by this Court in Arnett v. Kennedy, supra, 416 U.S. 134.

With regard to the risk of erroneous application of the statute, the California Court of Appeal relied heavily on two factors which it felt obviated the need

for preremoval safeguards: (1) the supposed clarity of the conduct proscribed by section 19503, and (2) the supposed absence of factual disputes concerning such absences. Upon closer examination, however, both of these factors are more complicated than would appear from the court's opinion.

First, while section 19503 itself may be relatively clear, the circumstances of its application are not. There are a wide variety of different leave programs available to state employees including vacation (section[5/] 18050), sick leave (section 18100), industrial disability leave (section 18120), nonindustrial disability leave (section 18135), compensating time off (section 18021.5), maternity leave (section 19334), military

5/ All references are to the California Goverment Code unless otherwise indicated.

leaves (section 18543), formal leave of absence (section 19330), informal leave of absence (Cal. Adm. Code, tit. 2, sec. 368), educational leave (section 19335), and many others.

Each of these leave programs has different requirements and different termination procedures. With this complicated scheme of leave programs, it is relatively easy to envision employees having difficulty determining just when they are or are not qualified for a particular leave, and just what type of leave they should be taking. Moreover, some of the leaves (such as sick leave and other forms of medical leave) are often granted subject to later medical verification. If it should later turn out that the employee is not qualified for this type of leave, and the employer refuses to substitute another form of

leave (as in Willson's case), the employee may be subjected to termination under section 19503 even though the employee thought he was covered by leave during the period of the absence. Thus while section 19503 may be relatively simple and clear on its face, the statutes which underlie it are not.

The second assumption of the Court of Appeal, that there are few factual disputes regarding section 19503, is also in error. Leave administration is usually handled at the lowest levels of state management where an employee may have more than one supervisor. Leave may be granted by one supervisor unbeknownst to another supervisor who may erroneously terminate the employee. One supervisor may accept one excuse for absence which another may not. Again, the variety of leave programs may lead to confusion among employees and

supervisors. All of these factors involve an infinite variety of factual situations and potential for human error.

Moreover, unlike the administrative systems approved by this Court since Mathews v. Eldridge, supra, 424 U.S. 319, the denial of leave leading to an "automatic resignation" under section 19503 has not already been scrutinized by any kind of administrative or judicial procedure. Cf. Dixon v. Love, supra, 431 U.S. 105. Indeed, there is no formality of any kind required to ensure that the action is being taken on the basis of objective information, such as an affadavit by a sworn peace officer or a chemical test by a responsible state official. Cf. Mackey v. Montrym, supra, 443 U.S. 1; Barry v. Barchi, supra, 443 U.S. 55.

From the foregoing, it must be apparent that the California Court of

Appeal's conclusion that preremoval safeguards are not needed because of the clarity of section 19503 and the lack of factual disputes concerning its operation is simply incorrect. Some minimal preremoval safeguards such as written notice and opportunity to respond would serve two valuable functions: (1) to clear up any factual or policy disputes concerning the employee's leave status, and (2) to ensure that lower level supervisors are not abusing the wide discretion they have in granting or denying leave.

With regard to the added administrative burden such procedures would create, these same added costs were considered and discounted by the Skelly court. 15 Cal. 3d at 215. Indeed, it is difficult to understand the Court of Appeal's conclusion that such costs would be substantial or would create long delays since the

state is already providing such safeguards in all cases of punitive action under State Personnel Board Rule 61 (Cal. Adm. Code, tit. 2, sec. 61). Surely, the state's ability to function will not be seriously impaired by providing an additional five-day period in which an employee may respond prior to termination under section 19503.

In sum, the California Court of Appeal has seriously misapplied due process theory in determining that the summary removal procedures of section 19503 pass constitutional muster. While this Court's recent decisions have made it clear that complicated preremoval safeguards are not required in such cases, this Court has never upheld a system which provides for no safeguards at all. This case presents the Court with the opportunity to make it clear that due process

still means that serious governmental action which deprives an individual of an important interest must be preceded by at least some minimal procedural protections which ensure "that the facts justifying the official action are as a responsible governmental office warrants them to be." Mackey v. Montrym, supra, 443 U.S. at 13.

3. The automatic resignation statute violates substantive due process by its arbitrary, unreasonable, and unduly harsh operation.

Willson's final contention is that the automatic resignation statute violates substantive due process by its arbitrary, unreasonable, and unduly harsh operation. Legislation which utilizes an irrebuttable presumption which is arbitrary and irrational offends due process standards. Cleveland Board of Education v. LaFleur

(1974) 414 U.S. 632; Vlandis v. Kline (1973) 412 U.S. 441; Stanley v. Illinois (1972) 405 U.S. 645. The automatic resignation provision of California Government Code section 19503(a) is just such a statute.

Section 19503 essentially provides that any absence without leave for five consecutive working days, whether voluntary or involuntary, is conclusively presumed to be an automatic resignation. Thus even where the employer has actual notice that the employee has no intention of resigning (as in Willson's case), the statute allows, even mandates, that the absence be treated as a resignation. Once the resignation is effected, there is no way to overturn it, unless of course it turns out that the employee was actually on approved leave. The only remedy available is prospective reinstatement after

making a "satisfactory" explanation to the Board for the failure to obtain leave. No back salary can be awarded even in cases where the failure to obtain leave may be completely justified and reinstatement is warranted.

What this means is that an employee with a perfectly justifiable excuse for not obtaining leave for five days will be conclusively presumed to have resigned, and will suffer separation even though all parties know that the employee has no intention of resigning. Moreover, even if the employee is eventually reinstated, he still suffers a lengthy suspension without pay because of section 19503's prohibition on back salary.

Even an employee such as Willson, who admittedly had no satisfactory explanation for his failure to obtain leave, suffers a punishment wholly disproportionate to the

offense committed. It is highly unlikely that Willson's single offense of improper sick leave use would have justified dismissal under the disciplinary provisions of the State Civil Service Act. See Catricala v. State Personnel Board (1974) 43 Cal.App.3d 642, 118 Cal.Rptr. 642 (first offense of sick leave abuse would not justify one-year demotion.) Yet because of the highly inflexible and artificial nature of the automatic resignation statute, Willson has been permanently deprived of his employment.

Finally, it must be observed that the automatic resignation statute only becomes "automatic" after the state determines that an absence is indeed without leave. Individual supervisors have a great deal of discretion in administering the state's various leave programs and can even make such determinations after the

fact. In Willson's case, the state could have allowed Willson to cover the period of his disallowed sick leave by allowing him to use vacation time (Cal. Gov. Code sec. 18050) or informal leave without pay (Cal. Adm. Code, tit. 2, sec. 368). This would mean that Willson would not have been absent without leave for the seven-day period and thus would not have been subject to the so-called "automatic" provisions of section 19503. Yet because Willson's superiors chose not to allow him to cover the period of his absence in this manner, Willson was subjected to summary termination under section 19503 even though he had no intention of resigning.

The large amount of hidden discretion under section 19503 means that many "automatic" resignations, like Willson's, are in reality hidden disciplinary actions.

If the employee is well-liked by his superiors, his absences will be covered by informal, discretionary leaves. However, if the employee is not well-liked, the temptation is great for a supervisor to be hard-nosed on leave policies and allow the automatic resignation section to become a disguised means of disciplinary action. It is precisely because of these types of abuses that the New York courts invalidated New York's constructive resignation rule. Matter of Johnson v. Director, Downstate Medical Center (1976) 52 A.D.2d 357, 384 N.Y.S.2d 189, affd. (1977) 41 N.Y.2d 1061, 396 N.Y.S.2d 172.

In sum, the automatic resignation statute violates substantive due process by irrebuttably presuming an employee has resigned where the employer knows full well that such is not the case. A statute

which has such potential for misuse and which is based on an artificial and unreasonable presumption should be struck down as a violation of substantive due process.

## CONCLUSION

For all of the above reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

PHILIP E. CALLIS
Counsel for Appellant

## APPENDIX

A. Opinion and Judgment of the California Court of Appeal, Third Appellate District, Entered December 15, 1980.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

| | | |
|---|---|---|
| DAVID WILLSON, Plaintiff and Appellant, | ) | No. 3 Civil 19252 |
| vs. | ) | FILED December 15, 1980 |
| STATE PERSONNEL BOARD, et al., Defendants and Respondents. | ) | Wilfried J. Kramer, Clerk |

APPEAL from a judgment of the Superior Court of Sacramento County, Joseph A. DeCristoforo, Judge. Affirmed.

Plaintiff Willson was a permanent civil service employee engaged as a building maintenance worker with defendant Department of General Services in Sacramento. He was absent without leave from his employment on March 30 and 31,

and April 3 through 7, 1978. During this period plaintiff called in "sick" on at least three occasions; in fact he had gone to San Jose to salvage, for his own private purposes, $7,000 to $10,000 worth of free lumber. He admitted the true reason for his absence to his supervisor on April 7, 1978.

In a letter dated April 10, 1978, the Department of General Services notified plaintiff that effective March 29, 1978, he was separated from his employment because of his absence without leave for five consecutive working days; this action was taken pursuant to the automatic resignation provision of Government Code section 19503. (All subsequent statutory references are to sections of the Government Code.)

Plaintiff appealed to defendant State Personnel Board (Board). A hearing was

held and on June 8, 1978, the Board adopted the decision of its hearing officer; it found plaintiff "had not made a satisfactory explanation of the reason for his absence" or "for his failure to obtain leave to cover the full period of his absence." The Board denied reinstatement.

On May 14, 1979, plaintiff filed the instant proceeding in superior court seeking a writ of mandate to set aside the Board's decision and to reinstate his employment with back pay. The trial court found the automatic resignation provision of section 19503 constitutional as applied to plaintiff and denied the petition. This appeal followed.

I

Central to plaintiff's appeal is the contention that he was severed from permanent civil service employment in violation

of the due process guarantees of the federal and state Constitutions. Relying on Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, plaintiff contends he should have been accorded certain procedural rights prior to his severance from civil service. For the reasons which follow, we do not agree.

Section 19503 provides for the automatic resignation of an employee from state service on the happening of certain specified events. That section apprises the employee of the precise conduct on his part which will trigger the mandatory consequences in the following language:

"Absence, without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee

worked."[1/]

When plaintiff voluntarily absented himself from work without leave for more than five consecutive days, such self-abdicating action triggered the

---

1/ At the time of plaintiff's termination, section 19503 further provided: "A permanent or probationary employee may within 90 days of the effective date of such separation, file a written request with the board for reinstatement; provided, that if the appointing power has notified the employee of his automatic resignation, any request for reinstatement must be made in writing and filed within 15 days of the service of notice of separation. Service of notice shall be made as provided in Section 18575 and is complete on mailing. Reinstatement may be granted only if the employee makes a satisfactory explanation to the board as to the cause of his absence and his failure to obtain leave therefor, and the board finds that he is ready, able, and willing to resume the discharge of the duties of his position or, if not, that he has obtained the consent of his appointing power to a leave of absence to commence upon reinstatement.

"An employee so reinstated shall not be paid salary for the period of his absence or separation or for any portion thereof."

(A subsequent amendment to the section (Stats. 1978, ch. 776, Sec.114) added a subd. (b); the amendment does not affect the present litigation.)

constructive resignation provision. (See Baker v. Wadsworth (1970) 6 Cal.App.3d 253, 262-263.) It was the plaintiff's own act, not the state's, which severed the employment relationship. Consequently, there was no governmental action which amounted to a "deprivation" or "taking" of property for due process purposes. (Cf. Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 560.)

To be contrasted with the constructive resignation provision of section 19503 are punitive actions to remove an employee for cause pursuant to section 19570 et seq. of the Civil Service Act. The causes for which an employee may be removed or otherwise disciplined in a punitive action are broadly defined in the statute. (Sec. 19572.) This lack of specific definition and the resulting infinite variety of factual situations

which may justify removal or discipline obviously give rise to problems of notice and essential fairness to an employee. (See Arnett v. Kennedy (1974) 416 U.S. 134, 161 [40 L.Ed.2d 15, 37].)

It was in the context of state action to remove a permanent employee for cause that the Supreme Court announced the necessity of preremoval procedural safeguards under the federal and state due process clauses. (Skelly, supra, 15 Cal.3d at pp. 202-203, 216.) The Skelly Court relied heavily on Arnett v. Kennedy, supra, 416 U.S. 134 [40 L.Ed.2d 15], holding: "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. . . . As a minimum, [however,] preremoval safeguards must include notice of the proposed

action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (Skelly, supra, at p. 215.)

Recent decisions of the United States Supreme Court subsequent to Arnett v. Kennedy, supra, 416 U.S. 134 [40 L.Ed.2d 15], indicate that in certain narrowly defined circumstances, the state may, consistent with the imperatives of due process, impair even fundamental private interests without first affording a hearing. In Mathews v. Eldridge (1976) 424 U.S. 319 [47 L.Ed.2d 18], the high court has enumerated the factors to be considered in analyzing the extent to which due process requires notice and hearing prior to the deprivation of some type of property interest: "first, the

private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (P. 335 [p. 33].)

In Dixon v. Love (1977) 431 U.S. 105 [52 L.Ed.2d 172], the United States Supreme Court upheld the constitutional adequacy of an Illinois regulation which authorized the Secretary of State to revoke a driver's license without preliminary hearing where the license had been suspended three times within a ten-year period. The regulation provided

for a full evidentiary hearing after revocation. The high court noted that the regulation set out a narrowly defined standard which gave precise notice of conduct that would be sanctioned [Dixon v. Love, supra, at p. 115 [p. 182]); moreover, the Secretary's revocation decisions under the regulation were "largely automatic" (id., at p. 113 [p. 180]). Applying the specific factors identified in Mathews v. Eldridge, supra, the court stated: "Since [the licensee] does not dispute the factual basis for the Secretary's decision, he is really asserting the right to appear in person only to argue that the Secretary should show leniency and depart from his own regulations. Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive

rights. We conclude that requiring additional procedures would be unlikely to have significant value in reducing the number of erroneous deprivations." (Fn. omitted; 431 U.S., at pp. 113-114 [52 L.Ed.2d, at p. 181].)[2/]

Applying the foregoing principles, we conclude that even if plaintiff's constructive resignation constituted governmental action for due process purposes, procedural fairness was not affronted by the lack of safeguards prior to plaintiff's resignation. Balancing the private and governmental interests involved (People v. Ramirez (1979) 25 Cal.3d 260, 268-269; Van Atta v. Scott

---

2/ In Oregon State Penitentiary v. Hammer (1977) 434 U.S. 945 [54 L.Ed.2d 306], the U.S. Supreme Court indicated that the principles set forth in Dixon are applicable to employment situations. (See also Civil Service Assn. v. City and County of San Francisco, supra, 22 Cal.3d at pp. 561-562, fn. 3.)

(1980) 27 Cal.3d 424, 434), we are satisfied the preremoval safeguards enumerated in Skelly would have little, if any, value in the present context. Though the property interest at stake is substantial, we have already noted that section 19503 gives fair notice of exactly when, why and how an employee constructively resigns his position; moreover, plaintiff does not dispute that he engaged in the conduct causing his resignation, and in the nature of such matters, conduct giving rise to automatic resignation is rarely, if ever, susceptible to factual dispute. Thus the risk of erroneous applications of the statute is nominal and would in any event scarcely be diminished by provision for preremoval hearing. Furthermore a substantial economic burden would be cast upon the state, and its ability to

function would be seriously impaired if its employees could absent themselves without leave for long periods of time and the state were required to give them notice and opportunity to respond before being able to fill vacant positions.

For the foregoing reasons we consider that plaintiff received all the procedural rights he was due by the opportunity afforded subsequent to his automatic resignation to explain "the cause of his absence and his failure to obtain leave therefrom" (Sec. 19503). We note that in that proceeding the Board fully reviewed factors in mitigation of plaintiff's absence without leave. (See also Baker v. Wadsworth, supra, 6 Cal.App.3d at pp. 264-265.)

II

The second prong of plaintiff's attack seems to be leveled at the harsh-

ness of automatic resignation as applied to him. He claims the application of section 19503 in his case was an abuse of discretion since the evidence tended only to show that he was a "bit of an entrepreneur" and did not establish that he was "evil or malicious."

As to plaintiff's automatic resignation, an abuse of discretion was impossible since section 19503 is automatic, not discretionary, in application. The appropriate avenue of attack thus would have been against the statute itself on substantive due process grounds. We are satisfied, however, that the Legislature reasonably could have concluded that voluntary absence without leave for five consecutive working days justifies a finding of constructive resignation.

As to the subsequent review proceeding accorded plaintiff to mitigate

any harshness caused by his automatic resignation, there likewise was no abuse of discretion. Plaintiff had the burden of furnishing satisfactory explanation as to the cause of his absence and his failure to obtain leave; "moonlighting" was not a legitimate excuse for failure to come to work as scheduled.

The judgment is affirmed.

PUGLIA, P.J.

We concur:

PARAS, J.

FINNEY, J.*

---

* Assigned by the Chief Justice.

## APPENDIX

B. Opinion and Decision of the Sacramento County Superior Court, Entered October 17, 1979

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

| | | |
|---|---|---|
| DAVID WILLSON, | ) | |
| | ) | |
| vs. | ) | No. 281521 |
| | ) | |
| STATE PERSONNEL BOARD | ) | |
| | ) | |

DATE: October 17, 1979

Department No. 10

Present: Hon. Joseph A. DeCristoforo, Judge
R. Flores, Deputy Clerk

---

Nature of Proceedings:
Order to Show Cause - Writ of Mandate.
Announcement of Court's Decision.

---

The Court is of the opinion that at least in the situation at bar, where the absence was voluntary and not involuntary, no constitutional attack can be leveled at Government Code Section 19503.

The petition for writ of mandate is DENIED, the request for attorney's fees is denied, and the alternative writ is discharged.

APPENDIX

C. Findings of Fact and Decision of the California State Personnel Board, Entered June 8, 1978

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of the Appeal by<br><br>DAVID WILLSON<br><br>For reinstatement after automatic resignation from the position of Building Maintenance Worker with the Department of General Services at Sacramento. | Case No. 9726<br><br>DECISION |

WHEREAS, the State Personnel Board has considered carefully the findings of fact and Proposed Decision filed by the Hearing Officer in the above matter; and

WHEREAS, by said Proposed Decision the appeal is denied;

IT IS RESOLVED that the findings of fact and Proposed Decision of the Hearing Officer in said matter are hereby adopted

by the State Personnel Board as its decision in the case.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing resolution, and I further certify that the attached is a true copy of the Hearing Officer's Proposed Decision adopted by the State Personnel Board in Case No. 9726 on June 8, 1978.

RONALD M. KURTZ
Ronald M. Kurtz,
Executive Officer,
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of the Appeal by DAVID WILLSON For reinstatement after automatic resignation from the position of Building Maintenance Worker with the Department of General Services at Sacramento. | Case No. 9726 |

PROPOSED DECISION

This matter came on regularly for hearing before Frank A. Iwama, Hearing Officer, State Personnel Board, on May 22, 1978, at Sacramento, California.

The appellant, David Willson, was present and was represented by Patrick Coughlin, State Employees Union, Local 411.

The respondent, Department of General Services, was represented by Allan I. Wendroff, Staff Counsel.

Evidence having been received and duly considered, the Hearing Officer makes the following findings of fact and Proposed Decision:

I

The above action, effective March 29, 1978 and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act.

II

Appellant was employed as a Building Maintenance Worker with the Department of General Services in Sacramento.

III

During the hearing, appellant stipulated that he was absent without leave from his employment on March 30 and 31, and April 3 through 7, 1978. He further stipulated that he called in "sick" during this period when in fact he was taking time off for other purposes.

IV

Shortly prior to his absence, appellant learned from his uncle that a bowling alley was going to be demolished in San Jose, and that there would be an opportunity to obtain free lumber from the structure. Appellant decided, since he was in the process of adding an addition to his home, that he would go to San Jose in order to salvage some free lumber. Appellant estimates that he salvaged approximately $7,000 to $10,000 worth of lumber.

V

In order to substantiate his absence, appellant decided to call in sick during the period of his absence. He decided not to request a leave or use vacation or dock time. His decision was based on the belief that a request for leave would be denied and also for the reason that he had

encountered prior conflicts with his supervisors.

VI

During the period of his absence, appellant telephoned his office on at least three occasions. He advised that he was ill and requested to be placed on sick leave. On April 5, 1978, appellant's immediate supervisor telephoned appellant's residence to inquire about his condition. The supervisor was informed that appellant was out of town. Two days later, appellant telephoned his supervisor and stated that he wished to withdraw his previous request for sick leave. He confessed that he was absent because of the opportunity to salvage free lumber from the bowling alley in San Jose.

VII

Appellant justified his absence without leave on the basis that he had

the opportunity to obtain valuable lumber for free.

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE HEARING OFFICER MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Appellant has not made a satisfactory explanation of the reason for his absence. Appellant also has not made a satisfactory explanation of the reason for his failure to obtain leave to cover the full period of his absence.

* * * * *

WHEREFORE IT IS DETERMINED that the petition for reinstatement after automatic resignation by appellant, David Willson, is denied.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its

adoption by the State Personnel Board as its decision in the case.

DATED: June 2, 1978.

/s/ Frank A. Iwama
FRANK A. IWAMA
Hearing Officer,
State Personnel Board

## APPENDIX

D. Order of the California Supreme Court Denying Appellant's Petition for Hearing, Filed February 18, 1981.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

| | | |
|---|---|---|
| WILLSON | ) | |
| | ) | ORDER DENYING |
| | ) | HEARING AFTER |
| vs. | ) | JUDGMENT BY THE |
| | ) | COURT OF APPEAL, |
| STATE PERSONNEL | ) | THIRD DISTRICT, |
| BOARD, DEPARTMENT OF | ) | Civil No. 19252 |
| GENERAL SERVICES | ) | |
| | ) | FILED |
| | ) | February 18, 1981 |
| | ) | Laurence P. Gill, |
| | ) | Clerk |
| | ) | J. Rossi, Deputy |

Appellant's petition for hearing DENIED.

BIRD, Chief Justice

## APPENDIX

E. Notice of Appeal to the Supreme Court of the United States, Filed May 5, 1981

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE THIRD APPELLATE DISTRICT

| | | |
|---|---|---|
| DAVID WILLSON<br><br>Appellant,<br><br>vs.<br><br>STATE PERSONNEL BOARD, DEPARTMENT OF GENERAL SERVICES, STATE OF CALIFORNIA,<br><br>Appellees. | ) | No. 3 CIVIL 19252<br><br>FILED<br>May 5, 1981<br>Wilfried J. Kramer, Clerk |

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that David Willson, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the

Court of Appeal of the State of California for the Third Appellate District, affirming the judgment denying petition for writ of mandate, entered in this action on December 15, 1980. Appellant's timely petition for hearing to the Supreme Court of California was denied by that court on February 18, 1981.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

DATED: May 1, 1981.

/s/ Philip E. Callis
PHILIP E. CALLIS
Counsel for Appellant

## APPENDIX

F. Excerpt from the Reporter's Transcript of the State Personnel Board Hearing Conducted May 22, 1978, (pp. 4-5).

MR. WENDROFF [state's counsel]: One other preliminary question: Do you have in your file the letter that was served on the Appellant? I don't know if we sent you a copy. That's the termination letter itself.

MR. COUGHLIN [appellant's union representative]: I've not seen it.

MR. WENDROFF: You have not seen it?

MR. COUGHLIN: No.

(Document shown to Counsel.)

HEARING OFFICER: Let the record reflect that I have reviewed the file and I do not find such a letter in our offical folder.

MR. WENDROFF: Do you have any objection to the introduction of this Into Evidence?

MR. COUGHLIN: If there's introduction that outlines his Skelly rights as well.

MR. WENDROFF: I don't think so. It's our view that the Skelly decision does not apply in this case. This is not a punitive action; it's an automatic resignation.

MR. COUGHLIN: Okay. I understand that.

MR. WENDROFF: At this time I would like to introduce this letter Into Evidence if there's no objection on the part of the Appellant. I think normally these types of letters would be sent to the Personnel Board as a matter of course and this may not have been sent.

(Document shown to Hearing Officer.)

HEARING OFFICER: Fine. Mr. Coughlin, do you have any objection to my receiving this into the record?

MR. COUGHLIN: We make an exception in that the Respondent's Counsel alleges this is not a punitive action and in that sense we believe it is terribly punitive and deprived him of his livelihood. However, we'll make our motion in the course of the hearing.

HEARING OFFICER: Fine. Let's take one issue at this time. First, do you have any objection to having this Admitted?

MR. COUGHLIN: No objection.

HEARING OFFICER: For the record, I'll receive Into Evidence as Respondent's No. 1 a letter dated April 10, 1978, to Appellant David E. Willson signed by Malcolm McKisson, Office Building Manager III. Attached to this letter is a

certification of mail or personal service. Now, Mr. Coughlin, I don't want to have you feel that I have deprived you of any right to raise any objection if you feel that you have a legitimate one concerning the procedure. Do you have one at this time?

MR. COUGHLIN: Yes, I do have an objection: That the Appellant was not notified of his rights of procedure as to the Skelly decision which in effect gives him five days to go before his appointing power and explain the reasons for his absence.

HEARING OFFICER: Okay. At this time I will take notice of your objection; however, it's my understanding of the law that the Skelly rights only apply to punitive actions and under the definition contained in the Government Code I do not believe AWOLs are under punitive actions.

So for that reason I'll not rule in your favor on this particular motion.

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1980

No. 80-1960

DAVID WILLSON,
*Appellant,*

v.

STATE PERSONNEL BOARD, DEPARTMENT OF GENERAL SERVICES, STATE OF CALIFORNIA,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

# MOTION OF APPELLEES TO DISMISS OR AFFIRM

GEORGE DEUKMEJIAN,
*Attorney General*
CORINNE LEE MURPHY
*Deputy Attorney General*
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-6721
*Counsel for Appellees*

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IN

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1980

No. 80-1960

DAVID WILLSON,
*Appellant,*

v.

STATE PERSONNEL BOARD, DEPARTMENT OF GENERAL SERVICES, STATE OF CALIFORNIA,
*Appellees.*

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

## MOTION OF APPELLEES TO DISMISS OR AFFIRM

The appellees, State Personnel Board, Department of General Services and State of California respectfully move to dismiss or affirm the judgment of Court of Appeal of the State of California for the Third Appellate District pursuant to Rule 16 of the Supreme Court of the United States.

## STATEMENT OF THE FACTS

The appellant was absent without leave from his em-

ployment as a building maintenance worker with the Department of General Services of the State of California in Sacramento, California for seven (7) consecutive working days encompassing March 30, 31, and April 3, through 7, 1978. Said absence without leave created an automatic resignation from State service in accordance with the provisions of section 19503 of the California Government Code.

Section 19503 provides that a former employee may request reinstatement, under certain limited procedures. The section states that reinstatement may be made *only* if the employee makes a satisfactory explanation to the Board as to the cause of his absence and his failure to obtain leave therefor, and the Board finds that he is ready, able, and willing to resume the discharge of his duties of his position or, if not, that he had obtained the consent of his appointing power of a leave of absence to commence upon reinstatement. The appellant filed a request for such reinstatement. Under Rule 67 of the rules promulgated by the State Personnel Board, any such filing is automatically referred to a hearing officer for hearing or investigation without hearing as appropriate. In this case the appellant was granted a hearing before an administrative officer of the Board on May 22, 1978.

At the administrative hearing, the appellant stipulated that he had been absent without leave for seven (7) consecutive working days but proceeded to offer evidence in mitigation. Appellant testified that he took the time off in order to salvage lumber out of town for a

profit. After considering the evidence presented at the hearing, the hearing officer found that the appellant had not made a satisfactory explanation of the reason for his absence nor a satisfactory explanation of the reason for his failure to obtain leave to cover the full period of his absence. On that basis, the petition for reinstatement after automatic resignation by the appellant was denied.

Appeal from the denial of the request for reinstatement was taken under section 1094.5 of the California Code of Civil Procedure. Respondents prevailed on the merits and the petition for writ of mandate was denied. Appeal was taken to the Court of Appeal of the State of California, Third District whose decision was filed on December 5, 1980 and from which the current appeal lies. The Supreme Court of the State of California denied hearing on February 18, 1981.

## QUESTIONS PRESENTED

(1) Whether the automatic resignation of appellant pursuant to section 19503 of the California Government Code constituted a governmental "deprivation" or "taking" of property under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(2) Whether, even if appellant's automatic resignation constituted governmental action for the purposes of the Due Process Clause, appellant was afforded adequate procedural due process in the form of his post-termination evidentiary hearing.

(3) Whether California Government Code section 19503 violates substantive due process.

## MOTION TO DISMISS

The appellees hereby move to dismiss the appeal on the ground that the questions presented by appellant are not of a substantial nature.

## MOTION TO AFFIRM

Alternatively, appellees move to affirm the judgment of the Court of Appeal of the State of California for the Third District that section 19503 of the California Government Code is not in any way violative of the Due Process Clause of the Constitution of the United States.

## ARGUMENT I

### THE AUTOMATIC RESIGNATION OF APPELLANT PURSUANT TO SECTION 19503 OF THE CALIFORNIA GOVERNMENT CODE DID NOT CONSTITUTE A GOVERNMENTAL "DEPRIVATION" OR "TAKING" OF PROPERTY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It was the holding in the decision from which this appeal derives that the act which severed the employment relationship of appellant and appellee State of California was appellant's own and not governmental action amounting to a "deprivation" or "taking" of property for due process purposes.

That holding was based on the rationale that the mechanism which terminated the employment relation-

ship was solely in the hands of appellant. It was he who absented himself for seven consecutive days without first obtaining one of the various forms of leave available to him. Certainly, as the court below pointed out, the appellant was on notice of the consequences of his absence. The Statute clearly stated that:

> "Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from State service, as of the last date on which the employee worked."
>
> The Court of Appeal held as follows:
>
> "When plaintiff voluntarily absented himself from work without leave for more than five consecutive days, such *self-abdicating* action triggered the constructive resignation provision. (See *Baker* v. *Wadsworth* (1970) 6 Cal.App.3d 253, 262–263.) It was plaintiff's own act, not the State's which severed the employment relationship. Consequently there was no governmental action which amounted to a "deprivation" or "taking" of property for due process purposes." (Cf. *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 569.) (Emphasis added.)

It is appellees' position that the Court of Appeal's decision was well-founded. As was explained in *Baker* v. *Wadsworth, supra,* 6 Cal.App.3d 253, an earlier Court of Appeal case, discharge or removal for cause is quite different from abandonment or constructive resignation. Compulsion is a "separate and distinct method" from "self-abdication." (*Baker* v. *Wadsworth, supra,* 6 Cal.App.3d 253, 262–263.) It is clear State action is not involved in the latter instance. Thus, the same proce-

dural requirements simply do not obtain.

Appellant argues that appellant's " 'self-abdication' of his job occurred only after two significant actions were taken by the State." The first of the alleged actions revolves around the State's supposed refusal to grant appellant's request for sick leave and subsequent refusal to convert the seven (7) days of absence without leave to some form of approved leave. In fact, the State could have pursued neither of the courses of action suggested by the appellant. Sick leave, by its very nature, is for someone who is "sick" which appellant admittedly was not.[1]

The appellant further misses the point when he speaks in terms of "converting" the absence without leave to vacation or leave without pay. As the Court of Appeal correctly pointed out, section 19503 of the Cali-

[1] Section 18100 of the California Government Code provides in pertinent part: "Each State officer or employee is entitled to such [sick] leave with pay, on the submission of satisfactory proof of the necessity for sick leave as provided by rule of the State Personnel Board." The pertinent Board rule is Rule 401 which provides as follows:

"401. Definitions. As used in this article, 'sick leave' means the necessary absence from duty of an employee because of:

"(a) Illness or injury.

"(b) Exposure to contagious disease.

"(c) Dental, eye, and other physical or medical examination or treatment by a licensed practitioner.

"(d) Required attendance, not to exceed five days in any calendar year, upon the employee's ill or injured mother, father, husband, wife, son, daughter, brother, or sister, or any person residing in the immediate household of the employee except servants, roomers, or roommates.

"(e) The death of a person related by blood, by adoption, or by marriage or any person residing in the immediate household of the employee. Each such absence shall not exceed five days."

Appellant fell under none of these categories.

fornia Government Code is mandatory, not discretionary, in nature. Once five (5) days of absence had occurred without any form of pre-arranged leave, the automatic resignation took effect. At that point the appellant was no longer an employee. His former employers had no power to do anything. Appellant's only recourse was as laid out by Statute and Board Rule.

Appellant further argues that the appointing power, appellant's employer General Services, had the discretion to reinstate appellant immediately under section 19140 of the California Government Code. Theoretically that is correct. Appellant, in his brief, however, quoted only a small portion of said section.[2]

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[2] The full text of section 19140 is as follows:

"In addition to reinstatement required under any other section, an appointing power may in his discretion, reinstate any person having probationary or permanent status who was separated from his position (a) by resignation, (b) by service retirement, (c) by termination from limited-term, temporary, career executive assignment, or exempt appointment, (d) under the provisions of Section 19503, or (e) without a break in continuity of state service to accept another civil service or exempt appointment.

"Such reinstatement shall be:

"(a) Subject to board rule;

"(b) Within three years unless the employee, other than members of the California Highway Patrol, has remained in state service without a break in the continuity of state service due to a permanent separation; and

"(c) To a vacant position

"(1) In the class vacated or from which separated, or

"(2) In a lower class in the same series, or

"(3) In a lower class in a related series requiring similar types of qualifications and knowledges and abilities, or

"(4) In another class having substantially similar duties, responsibilities, and qualifications, and substantially the same salary range.

"For reinstatement after separation, the time spent (a) in a position which is exempt from civil service or (b) as a temporary employee in another governmental agency engaged in a technical cooperation program under an agreement approved by the state or (c) in the recognized military service shall not be considered in computing the three-year period."

Section 19140 encompasses a wide range of former employees and provides for a mechanism by which an appointing power may reinstate said employees without resorting to the normal testing procedures and lists. This enables former employees who have already demonstrated an ability to pass the required test and to perform employment satisfactorily by having earned permanent employee status to reinstate with relative ease at the *discretion* of an appointing power. That appointing power may be either the former employer or another appointing power.

It is important to note that the matter is discretionary on the part of any appointing power. The Statute refers to large categories of former employees and certainly was not tailored primarily for employees separated under section 19503. The statute is designed for the convenience of the appointing powers. In the instant case appellee did not choose to exercise its discretion to reinstate appellant after the fact of his resignation. There was no testimony that this particular option was even discussed. It chose, instead, to allow appellant to pursue the remedies provided by Statute.

However, the key point to be made is that, again, it cannot be said that there was State action simply because the appellee, General Services, didn't immediately reinstate appellant. That non-act did not terminate the employment relationship. It had already been terminated. Section 19140 simply allows a rehiring at any time within three (3) years after the date of termination and is a *separate and distinct transaction* from the termination itself.

Finally, appellant alleges darkly that there exists a "large amount of hidden discretion" within the terms of section 19503. He states that many automatic resignations, like appellant's are in reality hidden disciplinary actions. That simply is not so. As will be discussed in greater detail in Argument II, the triggering mechanism of section 19503, absence without leave for a period of five (5) days, is straight-forward and clear-cut as opposed to disciplinary actions. Appellant alleges that the building manager stated that the matter could have been handled "differently" if it were the first time and "nobody else knew about it." It is interesting to note that the only assertion that such a conversation took place is contained in the testimony of appellant, himself, at the administrative hearing. He further testified that the alleged comment was "curious" to him and that even he didn't know what the building manager meant. (See Appendix.) The hearing officer made no finding of fact relative to that testimony so we have no way of telling whether the hearing officer found such testimony to be credible or lacking in credibility. (See Appellant's Appendix, p. 20a–25a.) Further, even had the building manager made such a statement, it would be irrelevant since it would not have been correct and his proposed action is not provided for by law!

Appellant has cited the New York case of *Johnson* v. *Director, Downstate Medical Center* (1976) 384 N.Y.S.2d 189 for the proposition that automatic resignation statutes are disguised means of disciplinary actions.

Despite whatever may occur within the State of New York, there was no evidence whatsoever at the administrative hearing that any such sham actions take place in California. We have simply appellant's conjecture and speculation set forth in his jurisdictional statement which cannot, appellees maintain, be used for any purpose.

## ARGUMENT II

### EVEN IF APPELLANT'S AUTOMATIC RESIGNATION CONSTITUTED GOVERNMENTAL ACTION FOR THE PURPOSES OF THE DUE PROCESS CLAUSE, APPELLANT WAS AFFORDED ADEQUATE PROCEDURAL DUE PROCESS IN THE FORM OF HIS POST-TERMINATION EVIDENTIARY HEARING

Appellant argues that the procedures such as those outlined in the California Supreme Court Case of *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194, requiring a pre-termination hearing should be applied to the factual situation presented in this case. That assertion is in error even if one were to accept the premise that both removals for cause and automatic terminations by resignation should be considered as State action. The distinction between the two can only be delineated by discussing *Skelly,* its antecedents from this Court and subsequent decisions by this Court and California Supreme Court.

*Skelly, supra,* was handed down in 1975 in response to *Arnett* v. *Kennedy* (1974) 416 U.S. 134. *Arnett* was a plurality opinion which upheld the constitutionality of a

federal statute and regulations thereunder which provided that a nonprobationary employee was entitled to 30 days advance written notice prior to removal, access to the material on which the notice is based, the opportunity to appear before the official vested with authority to make the removal sufficient in order to answer the charges against him, the receipt of notice of an adverse decision on or before its effective date and the right to appeal an adverse decision (pp. 143–144). The opinion of the plurality (consisting of Justices Rehnquist and Stewart and Chief Justice Burger) apparently found that the "property" interest in continued government employment was necessarily defined and limited in the statute. Justices Powell and Blackman, while agreeing that the pretermination procedures outlined above comported with constitutionally required due process, were of the opinion that the property right was rooted in the constitution itself (pp. 166–167). Further, the plurality seemed to suggest that a post-termination hearing would have been sufficient compliance with the Due Process Clause (p. 167). At least three cases have cited *Arnett* for this last proposition: *DiLuigi* v. *Kafkalas* (3rd Cir. 1978) 584 F.2d 22, 27, f. 7; *DeSalas* v. *Burgos* (1st Cir. 1979) 595 F.2d 81, 83; *Newman* v. *Board of Education of City School District of New York* (2d Cir. 1979) 594 F.2d 299, 304. Justice White opined that a pretermination hearing was required but not of an evidentiary nature; although he would require that the employee be allowed to answer the charges against him before an impartial hearing officer rather than the official vested

with the authority to make the removal decision (p. 202). Justices Douglas, Marshall and Brennan were of the opinion that the constitution required a preremoval evidentiary hearing (p. 206). From this authority the principles in *Skelly* were born.

*Arnett,* however, was not the final word of this Court on the issue of pretermination hearings. *Mathews* v. *Eldridge* (1976) 424 U.S. 319, was handed down several months subsequent to *Skelly, supra. Mathews* dealt with the termination of social security disability benefits. *Mathews* set forth a balancing test to be used in determining the type of termination procedures required:

> ". . . identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews* v. *Eldrige, supra,* at p. 335.)

This balancing test has been since utilized by this Court and by the California Supreme Court. (*Ingraham* v. *Wright* (1977) 430 U.S. 651, 675; *Dixon* v. *Love* (1977) 431 U.S. 105, 112–113; *Civil Service Association* v. *City and County of San Francisco* (1978) 22 Cal.3d 552; *Mackey* v. *Montrym* (1979) 443 U.S. 1, 11.)

*Dixon* v. *Love, supra,* 431 U.S. 105, is the case from

which an analysis for the situation presented in the instant case should begin its focus. *Dixon* involved the Illinois Driver Licensing Law, and a regulation thereunder, which authorized the Secretary of Illinois to revoke the driver's license without preliminary hearing in the event the driver's license was otherwise suspended three times within a ten-year period. Under the statutory scheme, the former licensee was entitled to a full evidentiary hearing after a revocation within 20 days following his request therefor. This Court reversed the judgment of the district court which had held that the driver was entitled to a pretermination hearing. In so doing, the court utilized a balancing test from *Mathews* v. *Eldridge* as previously set forth herein. (*Bell* v. *Burson* (1971) 402 U.S. 535, had previously held that a driver's license was a property interest to be afforded due process in removal.) The court held "here the Secretary *commendably* sought to define the statutory standard narrowly by the use of his rule-making authority. The decision to use *objective* rules in this case *provides drivers with more precise notice* of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers" (p. 115). (Emphasis added.) Justice Stevens, joined by Justice Marshall, wrote in a concurring opinion that because appellee's license was subject to *mandatory* revocation, *no prior hearing was necessary.* (*Dixon, supra,* p. 117.)

The circumstances in *Dixon* are closely analogous to the instant case because of the clarity of the triggering conduct and the mandatory nature of the consequences.

(*Arnett,* on the other hand, stated that the nature of dismissals "for cause" and the infinite variety of factual situations giving rise to cause necessitate imprecise language. Obviously, dismissal "for cause" requires more specific notice to the employee when he has engaged in conduct considered by the employer to be "cause." *Arnett,* p. 161.)

This Court, itself, has indicated that the principles set forth in *Dixon* are to be applied to employment situations. In *Oregon State Penitentiary* v. *Hammer* (1977) 434 U.S. 945, a decision by the Oregon Supreme Court (*Hammer* v. *Oregon State Penitentiary* (1976) 276 Or. 651, 556 P.2d 1348) affording *Skelly*-type rights to a "tenured employee" was vacated and remanded to the Oregon Supreme Court to be reconsidered in light of *Dixon* v. *Love.* (See also *Civil Service Association, supra,* 22 Cal.3d 552, 561–562, fn. 3.) *"Hammer I"* (at 556 P.2d 1348, 1349), dealt with an employee who had been dismissed for excessive absenteeism due to physical injuries. There was no evidence of malingering. The Oregon Supreme Court held that a "classified" state employee must be notified of the charges against him as well as the proposed sanction, and he must also be given an opportunity to respond. As stated earlier, this Court granted certiorari, vacated the judgment and remanded the case for reconsideration in light of *Dixon* v. *Love.* The case was reconsidered by the Oregon Supreme Court in 1978. (*Hammer* v. *Oregon State Penitentiary* (1978) 583 P.2d 1136.) In *"Hammer II"* the court continued to hold that the employee, who had not been warned prior to dismis-

sal that the state was considering such an action, was entitled to pretermination notice of the charges and an opportunity to respond. The court continued:

> "Had Hammer's superiors established a *specific limit on absenteeism, beyond which additional absences would lead to automatic dismissal,* this case would be much closer to *Dixon.*" (*Hammer II* at p. 1138, emphasis added.)

*Hammer II* was also appealed to this Court. Certiorari was denied.

A second case significant to this question is *Regents of the University of Minnesota* v. *National Collegiate Athletic Asso.* (2nd Cir. 1977) 560 F.2d 352, which dealt with an act of the National Collegiate Athletic Association placing the University of Minnesota on indefinite probation for refusing to find certain athletes immediately ineligible after the discovery of certain infractions. The University attempted to argue that they had proceeded correctly in holding a prior hearing because the athletes were constitutionally entitled to pretermination due process even though there were restrictions requiring immediate ineligibility upon the violation of said restrictions and the violations were acknowledged. The Federal Court of Appeals held otherwise.

> "Although consideration of mitigating circumstances occurs only *after* a student-athlete is declared ineligible, the [initial] declaration of ineligibility itself necessarily follows a member institution's determination that an infraction has occurred. Due process is flexible and calls for such procedural protections as the particular situation demands. [Cita-

tion omitted.] On the facts here, it cannot seriously be maintained that the student-athletes were entitled to a consideration of mitigating circumstances prior to a declaration of ineligibility. See *Dixon* v. *Love,* 431 U.S. 105, 114, 97 S.Ct. 1723, 52 L.Ed.2d 172, fn. 10 (1977). Accordingly, the presence or absence of mitigating circumstances was irrelevant to University's task of determining whether or not the infractions had occurred." (*Regents, supra,* p. 368.)

The court further pointed out that as the *restrictions causing mandatory ineligibility were in effect at all times material,* neither the athlete nor the University could successfully maintain that the Association failed to give fair warning! (*Regents,* p. 370.) Further the court cited *Dixon* as follows:

"Since appellee does not dispute the factual basis for the Secretary's decision, he is really asserting the right to appear in person only to argue that the Secretary should show leniency and depart from his own regulations. Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights." (*Dixon* v. *Love, supra,* 431 U.S. at 113–114 and *Regents, supra,* at p. 371, fn. 32.)

The principles in the above-cited cases may be distilled and applied to the operation of section 19503 to show that it comports with constitutional requirements.

It appears relatively clear that the continued employment of a nonprobationary employee such as petitioner is a property interest within the meaning of at least the California Constitution. Therefore, any removal or "taking" *by the State* of such continued employment re-

quires procedural due process. The question then is raised as to whether section 19503 provided petitioner with due process as required constitutionally if it may be seriously maintained that the *State* "took" from appellant. Respondents urge that the answer is unequivocally affirmative.

As this Court has stated: "Due Process is flexible and calls for such procedural protections as the particular subject demands." *Morrissey* v. *Brewer* (1972) 408 U.S. 471, 481; *Mathews* v. *Eldridge, supra,* at p. 334.

Thus, given the property interest, we must look to other factors to be weighed in the particular circumstances as are presently before us. Two other factors, other than the type of property interest, to be considered in the *Mathews* balancing theory are the risk of erroneous deprivation of such interest and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Regarding the former, section 19503 provides for a certain and swift effect after the occurrence of a very specific event. The event is not subject to interpretation. An employee is either absent without leave or he is not. It is extremely easy to determine. The person is either on the job or not. If he is not, he is either absent with *prearranged* leave or, if he has not been granted leave, he is absent without leave. This determination is factual and easily ascertainable on each day that it occurs. Section 19503 provides that if the absence without leave continues for five consecutive days, there is an automatic resignation.

Section 19503 is closely analogous to the situations in *Dixon* v. *Love,* and *Regents of the University of Minnesota* v. *National Collegiate* and the circumstances distinguished in *Hammer II.* (All *supra.*) Here the employee has clear notice of one type of behavior that will automatically result in his resignation. It is certainly different from punitive actions wherein an employee may not really be on notice as to what specific type of behavior warrants punitive action. For instance, section 19572 of the California Government Code allows punitive actions to be brought on the basis of "incompetency," "insubordination", "inefficiency," "inexcusable neglect of duty," "immorality," "discourteous treatment of the public or other employees" and "other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his agency or his employment" as well as other infractions. These charges are necessarily broad to encompass a wide variety of behavior and are, thus, vague. It is only reasonable that the employee be given specific examples of the conduct contained in one of these types of charges. Because of the specificity of section 19503, however, there is no necessity for prior written notice. The notice is set out by statute. The conditions are clear and concise. The voluntary resignation at the conclusion of five days allows the State to move swiftly to fill a position. There is very little danger of erroneous decisions. Further, there is provision for reinstatement upon the showing of mitigating factors.

Certainly the circumstances triggering the automatic resignation in this case are much more precise than the highly disputable factual situations in *Barry* v. *Barchi* (1979) 443 U.S. 55, wherein it was also held that a summary suspension was proper without a *pre*-termination hearing. As this Court held in *Mackey, supra,* at p. 13:

> ". . . the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations." (See also *Greenholtz* v. *Nebraska Penal Inmates* (1979) 442 U.S. 1, 7.)

As stated earlier, the burden put on the State must also be considered. Ofttimes an AWOL will have left the area or for some reason be unreachable. To burden the State with giving notice to a missing employee before his employment may be terminated or his position filled is untenable. It would lead to a paralysis as to a position each time an AWOL occurred. The State must be free to fill vacant positions in order to accomplish that position's function. Further, section 19503 serves as a deterrence to illegal strike activity. Section 19503 allows the State to rapidly refill positions in the event such activity takes place. The State is thus prevented from being immobilized. The burden should properly be placed on the employee who alone knows the reasons for his absences and failure to obtain leave.

An employee is protected by the right to a hearing wherein mitigating factors may be brought forward to justify a reinstatement. This procedural protection is virtually identical to the procedures in *Dixon* v. *Love* and *Regents of the University of Minnesota* v. *National Collegiate.*

In conclusion, section 19503 provides adequate procedural protection in its operation. Appellant has long been afforded notice and was afforded a prompt hearing after his mandatory and automatic resignation.

## ARGUMENT III

## CALIFORNIA GOVERNMENT CODE SECTION 19503 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

Appellees maintain that the court below was correct in its assessment that the State Legislature could reasonably conclude that a voluntary absence without leave for five (5) consecutive working days justifies a finding of constructive resignation. The court simply is in accord with this Court in its decisions in *Dixon* v. *Love, supra,* and *Mackey* v. *Montrym, supra.*

## CONCLUSION

For the foregoing reasons, appellees respectfully request that the decision of the Court of Appeal of the State of California for the Third District be either dismissed or affirmed.

Dated: JUL 17 1981

GEORGE DEUKMEJIAN
*Attorney General of the State of California*

CORINNE LEE MURPHY
*Deputy Attorney General*

By _____
CORINNE LEE MURPHY
*Deputy Attorney General*

# APPENDIX

Excerpt from the Reporter's Transcript of the State Personnel Board Hearing Conducted May 22, 1978, p. 21.

A (Mr. Willson) One thing in my discussion there with Mr. McKisson that kind of stuck in my mind and was curious to me, he said over a couple of times, "If this was the first time and nobody else knew about it, we could handle it differently." I didn't know what that meant because I had stipulated that I would be glad to take the time off without pay just as dock time or just vacation however they wanted to do it I wanted to make it right as far as the State went, as far as morally what was the correct thing to do.